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Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability  
Litigation,

No. 2:15-MD-02641-DGC

**DEFENDANTS' UNOPPOSED  
MOTION AND INCORPORATED  
MEMORANDUM TO SEAL**

Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively “Bard”) hereby respectfully move this Court for an order, pursuant to the Stipulated Protective Order (Doc. 268), Federal Rule of Civil Procedure 26(c)(1)(G), and Local Civil Rule 5.6 sealing certain documents accompanying Bard’s Motion for Protective Order Regarding Discovery of Litigation Consultant’s Report. The exhibits that are the subject of Bard’s Unopposed Motion to Seal constitute trade secrets or other confidential research, development, or commercial information thereby warranting protection from public disclosure for a discovery related motion; and they previously have been sealed by the United States District Court for the Northern District of Texas in *Alexander v. C. R. Bard, Inc.*, No. 3:12-cv-05187-O. The plaintiffs do not oppose the relief sought by this

1 Motion, but expressly reserve their challenges to, and their rights to challenge, Bard's  
 2 claim of confidentiality as to the subject documents. Accordingly, there is good cause to  
 3 grant Bard's Unopposed Motion to Seal.

#### 4 **ARGUMENT AND CITATION OF AUTHORITY**

5 In conjunction with Bard's Motion for Protective Order regarding Dr. Lehmann's  
 6 December 15, 2004, report, Bard wishes to submit the following confidential documents  
 7 to the Court for its consideration: internal e-mails and memoranda regarding adverse  
 8 event reporting, investigation, analysis, and responses; detailed, patient-specific  
 9 Complaint files; affidavits revealing internal Bard policies and corporate structure; and the  
 10 sealed transcript of the *Alexander* hearing ("Documents at Issue").<sup>1</sup> The documents and  
 11 testimony reflect Bard's confidential trade secrets and/or contain highly competitive,  
 12 confidential, or proprietary information that warrants protection under Federal Rule of  
 13 Civil Procedure 26(c)(1)(G) because the documents and testimony are not made public by  
 14 Bard and, if obtained by Bard's competitors, would give an unfair economic advantage to  
 15 those competitors. Additional documents to and from Bard's Law Department also were  
 16 sealed by the *Alexander* Court, and Bard submits those previously sealed documents to be  
 17 sealed here as well.

#### 18 **A. Bard Asserts that the Documents At Issue Are "Confidential Information"** 19 **Pursuant to the Stipulation for Protective Order, and Therefore They Should** 20 **Be Sealed**

21 The Court has entered a Stipulated Protective Order to protect public disclosure of  
 22 "Confidential Information," which includes any "'trade secret' or other confidential  
 23 research, development, or commercial information' that is suitable for protection under  
 24 Federal Rule of Civil Procedure 26(c)(1)(G)" Stipulated Protective Order (Doc. 269 ¶¶ 1,  
 25 2.) Bard has designated the Documents at Issue in this motion as "CONFIDENTIAL"  
 26 where those documents have been produced during discovery (*Id.* ¶ 6). As to Documents  
 27 at Issue that have not been produced during discovery, Bard maintains that such  
 28 documents are "Confidential" and thus likewise designates them as "CONFIDENTIAL."

<sup>1</sup> A more detailed listing of each exhibit at issue is attached as Exhibit A.

Finally, the Stipulated Protective Order states “All Confidential Information shall be used for the purpose of this lawsuit only . . . except as permitted by this Order.” (*Id.* ¶ 12). These types of provisions are common in legal proceedings and are routinely enforced. *See, e.g., Culinary Foods, Inc. v. Raychem Corp.*, 151 F.RD. 297, 307 (N.D. Ill. 1993) (“We hold that confidential information obtained by Culinary in this litigation may not be disseminated to litigants in other cases against Raychem.”); *cf Smithkline Beecham Corp. v. Synthron Pharmaceuticals Ltd.*, 210 F.RD. 163, 169 (M.D.N.C. 2002) (refusing to modify protective order to allow plaintiffs to use confidential documents in other litigation). Thus, the Court should grant Bard’s Unopposed Motion to Seal to maintain the confidentiality afforded by the Stipulated Protective Order to the Documents at Issue.

**B. The Documents at Issue Warrant Protection Pursuant to Fed. R. Civ. P. 26(c)(1)(G) as Trade Secrets or Other Confidential Research, Development or Commercial Information, and Would Cause Bard Competitive Harm if Made Public**

Federal Rule of Civil Procedure 26(c)(1)(G) provides that the Court may, for good cause, “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (G) requiring that a trade secret or other confidential research, development, or commercial information . . . be revealed only in a specified way.” “Good cause” exists when disclosure will result in “a clearly defined and serious injury to the party” seeking closure. *Blanchard & Co., Inc. v. Barrick Gold Corp.*, No. 02-3721, 2004 WL 737485, at \*5 (E.D. La. Apr. 5, 2004) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). In determining whether “good cause” exists, the court “must balance the requesting party’s need for information against the injury that might result if uncontrolled disclosure is compelled.” *Id.* The Court has wide discretion in determining the scope of an order protecting confidential research, development, or commercial information. *See id.*

The information contained in the Documents at Issue includes confidential business information and correspondence concerning Bard’s complaint handling processes, quality control and quality system procedures, device tracking methods, and corrective action

1 strategies, policies, and procedures. *See* Carr Aff. ¶ 8.b, Aug. 28, 2014, attached as  
 2 Exhibit B.<sup>2</sup> The Documents at Issue represent the implementation of these processes,  
 3 procedures, and policies, which Bard has in part developed to comply with the technical  
 4 requirements provided for by the FDA and/or Bard's internal requirements. *See id.*

5 The information contained in the Documents at Issue took years for Bard to  
 6 develop. *See id.* ¶ 8.d Given the time and money that Bard has invested in developing its  
 7 evaluative and investigative processes, as well as its processes for regulatory and internal  
 8 policy compliance, competitor medical device companies would gain an unfair economic  
 9 advantage if they gained access to Bard's commercial information, thereby causing Bard  
 10 real and tangible harm in the highly competitive medical device industry. *See* Carr Aff. ¶  
 11 10.<sup>3</sup> Moreover, because of the economic injury that Bard would sustain if its internal  
 12 documents were available to competitors, Bard seeks to protect the confidentiality of  
 13 material like the Documents at Issue whenever its internal documents are at issue in a

14 <sup>2</sup> Mr. Carr's affidavit was executed in relation to a motion to seal in a related case against  
 15 Bard and dealt with some of the same documents at issue here. To the extent that the  
 16 Court would like additional information regarding individual documents listed in Exhibit  
 17 A, Bard will supplement the record.

18 <sup>3</sup> *See e.g., Medicis Pharm. Corp. v. Acella Pharm., LLC*, CV 10-1780-PHX-JAT, 2012  
 19 WL 2260928 at \*2 (D. Ariz. June 15, 2012) (sealing exhibits related to "Medicis'  
 20 marketing strategy, Acella's product formulation, . . . various emails and deposition  
 21 transcripts, viscosity test data, sales and marketing information, and various other  
 22 documents" because "[m]uch of this information has been previously sealed by the Court,  
 23 has been designated as confidential by the parties pursuant to the protective order in this  
 24 case, or could otherwise potentially harm the parties if released publicly because of its  
 25 confidential and sensitive nature."); *see also, e.g., In re Denture Cream Products Liab.*  
 26 *Litig.*, 09-2051-MD, 2013 WL 214672 (S.D. Fla. Jan. 18, 2013) (sealing internal company  
 27 documents because the "common law right of access to judicial proceedings does not  
 28 apply under the facts of this case" the document at issue implicated hundreds of employee  
 hours of work, costs hundreds of thousands of dollars to plan, implement and analyze,  
 have substantial commercial value and are of substantial value to other denture adhesive  
 manufacturers."); *In re Eli Lilly & Co., Prozac Prods. Liab. Litig.*, 142 F.R.D. 454, 460  
 (S.D. Ind. 1992) (holding pharmaceutical company would suffer harm if the  
 manufacturing process it has expended time and money developing became known to  
 competitors); *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 305 *order*  
*clarified*, 153 F.R.D. 614 (N.D. Ill. 1993) ("[D]isclosing Raychem's product design  
 modification and changes would decrease Raychem's incentive to invest in safety devices.  
 Raychem's competitors would get free access to information which Raychem has spent a  
 great deal of time and money producing and protecting"); *In re Gabapentin Patent*  
*Litigation*, 312 F. Supp. 2d 653, 659 (D.N.J. 2004) (noting the pharmaceutical industry is  
 highly competitive and granted protective order); *see also, e.g., Davis v. AT&T*, 1998 WL  
 912012 (W.D.N.Y. 1998) (noting the market for automatic speech recognition technology  
 is highly competitive and rises to the level of the court's protection).

litigation.<sup>4</sup> *See id.* ¶ 11.

Finally, because the documents at issue do not relate to a motion that requires judicial resolution of this case on the merits, there is no general First Amendment right to access the Documents at Issue. *See, e.g., Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312–13 (11th Cir. 2001) (finding that “material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right”); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995) (“We are not aware . . . of any common-law principle that documents submitted to a court in camera for the sole purpose of confirming that the refusal to disclose them to another party was proper, are to be deemed judicial records open to the public.”); *The Courier-Journal v. Marshall*, 828 F.2d 361, 363 (6th Cir. 1987) (newspapers had no first amendment right of access to discovery materials, despite the recognition that “proceedings [were] of intense public concern”).

For each of these reasons, Bard has met the good cause standard for protection of its documents by showing that public disclosure of the Documents at Issue will cause a clearly defined injury to Bard. *See Shell Exploration & Prod. Co. v. Robinson*, No. CIV.A. 01-1417, 2001 WL 1490954 (E.D. La. Nov. 20, 2001) (finding that good cause existed for sealing judicial record “out of an abundance of caution in order to protect trade secrets” even when the testimony at issue “would not be particularly illuminating,” the “testimony did not specify any particular trade secrets”). Accordingly, the Court should grant Bard’s Unopposed Motion to Seal.

### **CONCLUSION**

For the foregoing reasons, the Documents at Issue warrant protection as confidential research, development, or commercial information pursuant to Rule

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<sup>4</sup> Therefore, Bard has taken reasonable efforts to maintain confidentiality of these documents and they should remain confidential. *See In re Denture Cream Products Liab. Litig.*, 09-2051-MD, 2013 WL 214672 (S.D. Fla. Jan. 18, 2013) (finding documents confidential in part because the defendant “consistently treated the information as closely guarded secrets”).

26(c)(1)(G). Accordingly, the Court should grant Bard's Unopposed Motion to Seal.

DATED this 30th day of November, 2015.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2015, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/

23009404

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